and not on September 30, 1979, having regard to the appellants' affidavit, which was not disputed by the respondents.

It may be accepted that in the circumstances, the notice of assumption at the time it was given could have been for the purpose of forestalling seizure by the court. We are also of the view that under ordinary circumstances the fact that the appellants gave notice of assumption of property without taking any positive steps to recover possession did not erase reputed ownership by the emporium at the time. The law appears to be that even if there is a termination of agreement, goods remaining in the possession of the tenant may still be within the reputed ownership of the tenant and liable to distress. But in the present case, there are other circumstances which should have been considered.

Although as at September 3, 1979 the emporium could be considered to be the reputed owner, the Sessions Court took over possession by the execution order, and the effective warrant of distress was only taken out on September 19, 1979. The material date to determine such possession as to make a tenant the reputed owner of a distrained article is immediately before and at the issue of the warrant of distress. The question which should be considered is whether after September 3, 1979 the emporium continued to be in such possession of the equipments under such circumstances that the emporium was still the reputed owner.

The evidence shows there was a change of circumstances brought about by the following events. On September 4, 1979 the respondents took out the first warrant of distress and apparently also distrained the equipments already under seizure by the Sessions Court the previous day. On application by the appellants, the learned trial judge, after a hearing on September 19, 1979 discharged the warrant on the ground indicated above. On this date when the respondents took out the present warrant of distress, they must have been aware of the full circumstances surrounding the equipments: the appellants had given notice of assumption of the equipments. The appellants were in no position to take steps to assume possession as the equipments were under attachment by the Sessions Court. By the notice it must be taken that the appellants as the true owners of the equipments had withdrawn consent and permission from the emporium being in possession of the equipments and were claiming them. There is nothing to show that the respondents were not aware of this notice even when they took out the warrant of distress on September 4, 1979. The indications are that the incorrect finding that this notice was given on September 30, 1979, instead of September 3, 1979 must have led the trial court to conclude that up to September 30, 1979, well after the present warrant of distress, the emporium still had possession of the equipments, subject to the Sessions Court attachment. Further, what is crucial to the appellants' right is that when the present warrant of distress came up for hearing on November 15, 1979, the solicitors of the respondents had already on September 26 or 27, 1979 acknowledged that the equipments belonged to the appellants and requested the Sessions Court to release them to the appellants. The acknowledgment must be taken to relate pack to the date of attachment and is a complete admission that the appellants were entitled to the equipments and the emporium had no right to possession. Nowhere in the judgment, did the learned trial judge advert to this admission.

Appeal allowed. Equipments to be returned to the appellants. Costs to the appellants. Deposit to be refunded to appellants.

Appeal allowed.

Solicitors: *Allen & Gledhill; Ong Ban Chai & Razak.*

PUBLIC PROSECUTOR v. MUNUSAMY

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya) & Hashim Yeop A. Sani J.) March 18, 19 & April 5, 1980]

[Kuala Lumpur — Federal Court Criminal Reference No. 4 of 1978]

Criminal Law and Procedure — Appeal — Issuing certificate required by law knowing it to be false — Concurrent findings of fact — Witness for prosecution impeached — Application to cross-examine witness refused — No failure of justice — Criminal Procedure Code (F.M.S. Cap. 6), s. 173(e) — Penal Code, ss. 193 & 197.

Immigration — Special pass — Whether "certificate" within s. 197, Penal Code — Immigration Act, 1963 — Immigration Regulations, 1963, reg. 14(3).

Penal Code, ss. 193 & 197 — Issuing certificate required by law knowing it to be false.

In this case the respondent had been convicted by the learned Magistrate for an offence under section 197 of the Penal Code for issuing a certificate which is required by law to be given knowing that it was false on a material point. On appeal the High Court allowed the appeal on the sole ground that the special pass issued in this case was not a certificate required by law to be given under section 197 of the Penal Code. The Public Prosecutor applied that the point of law be referred for the decision of the Federal Court and the Federal Court decided that the special pass was a certificate required by law within the meaning of section 197 of the Penal Code — see [1979] 2 M.L.J. 286. The whole case was then reargued as a regular appeal.

Held: (1) in this case there had been concurrent findings of facts in the Lower Courts and the Federal Court should not therefore interfere, as it was not shown that there was a miscarriage of justice or violation of some principle of law or procedure;

(2) the refusal to allow a witness for the prosecutor who had been impeached to be cross-examined by the accused did not constitute a misdirection and even if it was, the Federal Court has power to dismiss the appeal, as there was no failure of justice.

Cases referred to:-

(1) *Public Prosecutor* v. *Munusamy* [1979] 2 M.L.J. 286.

(2) *Lim Tong* v. *Public Prosecutor* [1938] M.L.J. 41.

(3) *Tengku Mahmood* v. *Public Prosecutor* [1974] 1 M.L.J. 110.

(4) *Rameswar Koer & Ors.* v. *Bharat Pershad Sahi* 4 Cal. W.N. 18.

(5) *Wong Thin Yit* v. *Mohamed Ali* [1974] 1 M.L.J. 1.

(6) *Hitam bin Abdullah* v. *Kok Foong Yee & Anor.* [1974] 1 M.L.J. 193.

[The following cases were also cited in argument: *Jayaram* v. *R.* [1956] M.L.J. 224; *Bhuboni Sahu* v. *King* A.I.R. 1949 P.C. 257, (1949) L.R. 76, I.A. 147, 157; *In re Howgate & Osborn's Contract* [1902] 1 Ch. 451; *Tammanna Kori* v. *Parappa Kori* A.I.R. 1945 P.C. 111; *Abdul Rahman* v. *Public Prosecutor* [1940] M.L.J. 55].

FEDERAL COURT.

Faidz bin Mohamad Darus (Deputy Public Prosecutor) for the appellant.

V.K. Palasuntharam for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J. (delivering the judgment of the Court): This case has a long history. On December 31, 1975 the appellant, Rasiah Munusamy, was convicted by the learned Magistrate, Malacca, for an offence under section 197 punishable under section 193 of the Penal Code. The charge read as follows: —

"That you on March 1, 1975 at about 4.30 p.m. at the Melaka Airport Immigration Check-point, in the District of Melaka Tengah, in the State of Melaka, issued a Certificate, to wit, a Special Pass No. 136844, which is required by law to be given and knowing that such certificate is false in a material point, to wit, that Madam Mariaie is a holder of Malaysian Passport, and that you have thereby committed an offence under section 197 and punishable under section 193 of the Penal Code."

On November 16, 1976 the appeal came before the High Court, Malacca and on December 27, 1977 the appeal was allowed and the conviction and sentences set aside. In the written judgment of the learned judge he clearly stated (in paragraph 5 of the judgment) that he had gone through all the grounds and found that there were no merits in them except that the Special Pass (P6) was, in his opinion, not a certificate "required by law to be given" under section 197 of the Penal Code.

On application by the learned Public Prosecutor, the learned judge acting under section 66 of the Courts of Judicature Act, 1964 reserved for the decision of this court the following question of law of public interest which arose in the course of the appeal and the determination of which by the judge affected the event of the appeal:

"whether a special pass issued under regulation 14(3) of the Immigration Act, 1963 (Laws of Malaysia Act 155) is a certificate required by law within the meaning of section 197 of the Penal Code, F.M.S. Cap. 45."

This court gave its judgment in *Public Prosecutor* v. *Munusamy*.[1] The answer to the question referred was in the affirmative. In that judgment this court also agreed with Mr. Palasuntharam, counsel for appellant, that the whole case may now be reargued as a regular appeal to satisfy the court that the conviction by the learned Magistrate was wrong.

The charge against the appellant concerned an event which occurred at about 4.30 p.m. on March 1, 1975 at the Malacca airport. The facts constituting the prosecution case are briefly as follows. Madam Mariaie (PW2) arrived by plane at the airport accompanied by her two children, Vasugi and Panneerchelvam. PW2, although said to have been born in this country was in fact not a citizen and was a holder of an Indian Certificate of Identity (P5). Quah Boon Huat (PW6), an immigration officer, was on duty then. While PW6 was clearing passengers, the appellant who apparently also had arrived by the same plane came to the check-point and instructed PW6 to issue a Special Pass to PW2. Appellant gave PW6 verbal instructions to the effect that the lady (PW2) was a holder of a Malaysian passport. Thus the statement on Special Pass (P6) "Holder of Malaysian Passport" was written by PW6. After PW6 had written out P6 he asked appellant to sign it. But appellant did not want to do so and said that since PW6 was the head of the team on duty that day PW6 should sign it. PW6 said he had to sign it as instructed since the appellant was his head of department. He then handed over P6 to appellant. PW2 was in fact a holder of an Indian Certificate of Identity (P5) and not a holder of Malaysian passport.

The procedure at any entry point in this country is explained briefly in the evidence of Zakaria bin Sulong (PW4) who was also an immigration officer. He said that when a visitor wishes to visit Malaysia, the visitor has before the plane lands, to fill in a form (disembarkation card). The immigration officer in-charge will then know what type of Pass should be issued to the visitor. According to PW4 the types of Passes are "Social Pass, Business Pass, Visit Pass, Temporary Work Permit Pass and Special Pass." The types of Passes are in fact described in Regulation 8(1) of the Immigration Regulations, 1963 (L.N. 228 of 1963) which reads as follows: —

"8. (1) The following classes of Passes may be issued under these Regulations for the purpose of entitling a person to enter and remain temporarily within the Federation or within Sabah or Sarawak:

(a) an Employment Pass or, for work or employment in Sabah, Work Pass;
(b) a Dependant's Pass;
(c) a Visit Pass;
(d) a Transit Pass;
(e) a Student's Pass;
(f) a Special Pass;
(g) a Landing Pass."

At the entry point the visitor has to produce all relevant documents, namely, his travel document, visit pass, medical certificate and disembarkation card. There are certain passes however which cannot be issued at the entry point. According to PW4, a social visit pass was not issued at the Malacca airport but issued only at the Immigration Office in Malacca.

The facts which are not disputed in this case relating to the travel documents involved need to be mentioned. As said earlier, although PW2 was said to have been born in this country she was in fact the holder of a Certificate of Identity issued by the Indian Government which was Exhibit P5. Before PW2 came to this country one Sevugapperumal s/o Sinniah Ambalam, also a non-citizen but resident in this country (PW1) had some time in January 1975 applied to the appellant for a pass to bring PW2 (according to him his mistress) and her two children to this country for a visit. She was then issued by the Immigration Office, Malacca, with a Visit Pass No. 102395, which was Exhibit P4. The minutes in the Malacca Immigration Office file dealing with social visit passes (P11) indicated that the appellant authorised the issue of the Social Visit Pass valid for three months on the following conditions, namely —

(1) that there should be a guarantee letter and letter of the Health Office and personal bond for one thousand dollars;

(2) that there should be a sponsor to sign the guarantee letter that she would not apply for extension of the Visit Pass; and

(3) that there should be an endorsement "RFR/M'CA" and the applicant to produce a return ticket to India.

This minute was dated January 22, 1975.

The Visit Pass was issued under Regulation 11(1) of L.N. 228/63 and it was in evidence that the appellant being the Head of Department of Immigration in Malacca, was the authority to approve the issue of such a pass. In the evidence of Haji Othman bin Omar, a Senior Assistant Controller of Immigration (PW5), it was explained that an endorsement "RFR/M'CA" means that the person concerned must report to the Malacca Immigration Office. The practice is that the holder of the pass will be issued with a special pass and then he or she has to report to the Malacca Immigration Office within the period specified. Meanwhile the visit pass and all travel documents would be collected by the immigration officer at the entry point. It is in the evidence of PW2 that the appellant collected both P4 and P5 from PW2 and then gave her the Special Pass (P6).

Mr. Palasuntharam argued at length on a number of points which may be summarised as follows —

(1) PW4, PW6 and PW14 should not be regarded as witnesses of truth. The principal prosecution witness is of course PW6. PW4 was the immigration officer attached to Malacca. PW14 was DPC. Zainal of the Special Branch, Malacca. It would seem that what was in dispute was only the evidence of PW4 in relation to the date that the file (P11) was sent to the appellant. PW4 stated in his evidence that he gave the file to the appellant on March 18, 1975 and this was returned to him on March 19, 1975. It was argued that if the record showed in P14 that the file concerning visit passes was sent to Johore Bahru on March 17, 1975 how could the file be handed to the appellant on March 18, 1975? PW4 admitted there could have been a mistake in P14 but was emphatic that the file on visit passes was in the Malacca office on March 18, 1975. In any case the evidence of PW4 other than relating the procedure on the issue of passes does not in our view have much bearing on the charge.

As regards PW6 it is the contention of the appellant that he was a subordinate officer with a grudge against the appellant. Therefore his evidence should not be believed. This allegation however finds no support whatsoever from the record. In our view PW6 was consistent throughout in his evidence that although he never saw PW2 or her two children he had to write out the Special Pass (P6) on the instruction of his superior officer, the appellant. Of the 21 passengers who alighted from the plane that day only 18 passengers produced their passports to him. The other 3 passengers who did not produce their passports were PW2 and her two children whom PW6 did not see at all. PW6 mentioned that appellant told him that PW2 and her two children had left their Malaysian passports in Singapore and their numbers were written at the back of the Special Pass. PW6 said he saw those numbers written at the back of the Special Pass but as there was no signature below the numbers he asked the appellant to sign below the numbers which the appellant did. The appellant's initial was identified in the trial court by PW6 and other witnesses.

PW14 corroborated PW6 on what the appellant was alleged to have said to PW6. PW14 was not a very intelligent witness as he was only a detective police constable assisting the Travel Control Officer (PW8). Mr. Palasuntharam argued that the evidence of PW14 should be disregarded because of the many contradictions in his evidence in relation to his statement earlier made to the investigation officer (PW17) of the B.S.N. But in our view these contradictions are not material. PW14 clearly said in his evidence that the appellant told PW6 that the Indian lady and her two children were Malaysian citizens who had just returned from India but had left their passports in Singapore.

(2) PW16, an immigration officer attached to Malacca was impeached. The learned Magistrate ruled that his evidence was to be ignored totally. Defence counsel then applied to recall PW16 but was refused by the learned Magistrate. Mr. Palasuntharam argued that the refusal by the learned Magistrate was contrary to the provisions of section 182(e) of the Straits Settlements Criminal Procedure Code, Cap. 21 (which was then applicable to Malacca) and therefore fatal to the proceeding. That provision stated clearly the procedure which shall be observed by all district courts in summary trials and paragraph (e) provided that the accused *shall* be allowed to cross-examine all witnesses for the prosecution. But the answer to that is simple. After the ruling made by the learned Magistrate, PW16 was no longer a witness for the prosecution in the real sense of the word for his evidence no longer constituted any part of the prosecution case. In any case assuming that there was a misdirection in law on the part of the learned Magistrate (we felt there was none) it is clear from *Lim Tong* v. *Public Prosecutor*[2] that a Court of Appeal has power to dismiss an appeal notwithstanding that there was a misdirection in law where no failure of justice has been occasioned by such misdirection.

(3) It was also the contention of the appellant that an examination of the events before and after March 1, 1975 (the date of the offence in the charge) would show that the appellant was acting in good faith at the Malacca Airport on March 1, 1975 and in fact had no motive whatsoever to mislead anybody. Furthermore neither appellant nor PW2 had anything to gain by PW2 being issued with a Special Pass. We do not think we should labour this point as the charge is under section 197 of the Penal Code. Bad faith or gain or hope of gain is not an ingredient of the offence.

(4) It was also argued that the learned Magistrate did not evaluate properly the evidence adduced by

the prosecution and did not judge the witnesses properly and therefore his finding was bad. Cited were *Tengku Mahmood* v. *Public Prosecutor*[3] and *Rameswar Koer & Ors.* v. *Bharat Pershad Sahi.*[4] It would seem that the appellant is trying not only to deny all the material prosecution evidence but suggested, quite seriously, that everyone concerned in the case was fabricating evidence. This line of argument was taken to the extent even to suggest that the whole Department of Immigration was out to "fix" the appellant. The basis of this allegation was perhaps that portion *D* of the Disembarkation Card was asked for by the defence but was never produced by the prosecution. It is however in evidence that portion *D* of the Disembarkation Card had already been sent to the Tracking Unit of the Immigration Department in Kuala Lumpur. On examination of the evidence we felt that the attack on the prosecution evidence and the explanation by the appellant on what transpired on March 1, 1975 was too far-fetched.

(5) Finally, it was contended that the statement in the Special Pass (P6) that PW2 was holder of a Malaysian Passport was not false in a material point. According to the defence that statement was in fact immaterial having regard to the object for which the Special Pass was granted. According to *Sarkar,* Ninth Edition, Vol. 2, page 1613, a certificate must be false on a material point. The question what point was material must depend upon the nature and object of the certificate. The object of a Special Pass is seen in Regulation 14(1) of the Immigration Regulations, 1963 as well as in the evidence of PW5, the Senior Assistant Controller of Immigration, Johore Bahru. According to Regulation 14(1) a Special Pass may be issued for any of the three purposes set out, namely —

(a) to afford an opportunity of making enquiry for the purpose of determining whether such person is entitled to an Entry Permit or otherwise entitled to enter the Federation; or

(b) in order to afford such person a reasonable opportunity of prosecuting an appeal against the decision of the Controller of Immigration; or

(c) for any other special reason.

PW5 in his evidence stated that a Special Pass may also be issued in case of doubt. In the case of the Special Pass (P6) issued to PW2, PW5 said that the reason for issuing it was "for further clearance." It is clear that the statement "Holder of Malaysian Passport" in P6 purports to indicate the status of PW2 and is therefore highly material although false. We therefore disagreed with Mr. Palasuntharam.

As pointed out earlier, the learned Magistrate's finding was upheld by the learned appeal judge in his grounds of judgment. We have gone through the evidence thoroughly ourselves and have come to the same conclusion. Where there have been concurrent findings of facts in the lower courts it should not be made a practice in the appeal court to review these concurrent findings of facts unless it is shown that there was no evidence to support the inferences drawn in the lower courts. Two Privy Council cases are relevant on this point. The first is *Wong Thin Yit* v. *Mohamed Ali*[5] where in a short judgment Lord Diplock said that it was not the practice of the Privy Council to review concurrent findings of facts from courts in Malaysia and dismissed the appeal. In *Hitam bin Abdullah* v. *Kok Foong Yee (f) & Anor.*[6] this point was dealt with in slightly more depth by Sir Harry Gibbs. In his judgment his Lordship emphasised that "It is very well established that as a general rule, their Lordships' Board will decline to interfere with the concurrent findings of two courts on a pure question of fact." The judgment went on as follows:—

"The nature of the exceptions that will justify a departure from the Board's settled practice are set out in *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy* [1946] A.C. 508 at page 521. Lord Thankerton there said:

'That in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure'."

He defined "miscarriage of justice" and then continued:

"That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law."

We therefore dismissed the appeal and restored the conviction recorded by the learned Magistrate. We were not satisfied that the sentences were wrong either in law or that they were manifestly excessive or inadequate on the facts and in the circumstances of the case. We therefore also restored the sentences.

Appeal dismissed.

Solicitor: *V.K. Palasuntharam.*

P.J.T.V. DENSON (M) SDN. BHD. & ORS. v. ROXY (MALAYSIA) SDN. BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman F.J., & Abdul Hamid J.) March 14 & April 9, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 148 of 1978]

Practice and Procedure — Execution of judgment against company — Land bought by company but registered in names of directors — Action for declaration that land is property of company against which judgment might be executed — Intent to defraud and defeat creditors.

Land Law — Land registered in names of directors of company — Whether title indefeasible — Fraud — Transfer set aside — National Land Code, s. 340.

Company Law — Directors — Land transferred to directors — Whether directors trustees — Specific Relief Act, 1950 — Companies Act, 1948, s. 20.

In this case the respondent had obtained judgment against the first appellant but the judgment was unsatisfied. The first appellant had agreed to buy land in Petaling Jaya and the sale agreement stipulated a transfer to the first appellant or its nominees. Subsequently the land was registered in the names of the second and third appellants, the directors of the first appellant. The respondent brought the action claiming a declaration that the land was the property of the first appellant against which the judgment might be executed. The de-